SUPREME COURT OF THE UNITED STATES.

No. 312.

THE WASHINGTON UNIVERSITY, *et al.*, Appellants,
vs.
GEORGE FINCH, Assignee of JAMES J. DALY and EDWARD R. CHAMBERS, Appellees.

JOHN M. KRUM,
Solicitor for Appellent.

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STATEMENT OF THE CASE.

James J. Daly and Edward R. Chambers, who were residents of Virginia, made their Deed of Trust (in the nature of a Mortgage), dated March 24, 1860, whereby they conveyed certain lands situated in St. Louis, Missouri, to Seth A Ranlett, one of the Appellants, then and still a resident of Missouri, in trust, to secure certain notes of said Daly and Chambers, which notes are particularly described in said Deed of Trust, and bear even date with it. The principal notes, each for the sum of $4,000, were payable respectively, in one, two and three years, from date.

There were also six notes given of the same date for interest on the principal debt, viz.: two for $360, each payable, respectively, in six and twelve months from date—two notes for $240, each payable, respectively, in eighteen and twenty-four months from date, and two notes for $120, each payable, respectively, in thirty and thirty-six months, from date.

All of the notes described in the Deed of Trust were endorsed and delivered by the payee to the Washington University (which is a corporation under the laws of Missouri) soon after they were made, and before either of them matured.

The Deed of Trust, which is set out in the Record, contains a *Power of Sale* to the grantee, which power is as follows: "but, if said notes are not well and truly paid when the same are due and payable, this Deed shall remain in force, and the said party of the second part, or in case of his death, absence from the State, or refusal to act, the Sheriff of St. Louis county may proceed to sell the property hereinbefore described, or any part thereof, at public vendue, to the highest bidder, at the east front door of the Court-House, in the City of St. Louis, for cash, first giving thirty days' public notice of the time, terms, and place of said sale, and of the property to be sold, by advertisement in some newspaper printed and published in the City of St. Louis, and upon such sale shall execute and deliver a deed in fee simple of the property sold, to the purchaser or purchasers thereof, and receive the proceeds of said sale; out of which he shall pay, first, the cost and expenses of executing this trust, including compensation to the Trustee for his services, and next, whatever may be due and owing on any of said notes, and the remainder, if any, shall be paid to the said parties of the first part, or their legal representatives." Two of the interest notes for $360, each due, respectively, in six and twelve months from date, and one principal note for $4,000, due in twelve months from date, were paid about the time said notes, respectively, became due.

On December 9, 1862, four of the remaining notes having become due and remaining unpaid, Seth A. Ranlett (who was a mere naked trustee), at the instance of Washington University, the holder of said notes, sold the real estate under and in pursuance of the said power, at public vendue, in the city and county of St. Louis, Missouri, having previously given the notice required by said deed of trust, and at said sale, the Washington University became the purchaser.

At the time of the said sale by the trustee, Daly and Chambers were residents of the State of Virginia.

Washington University, having in 1867 sold the said real estate for a sum larger than the said indebtedness of Daly and Chambers, remaining unpaid at the time of said trustee's sale, the complainants bring this bill to compel the University to account to them for the difference between the amount of said indebtedness existing at the time of said sale, and the

price for which the University sold the land in the year 1867.

BRIEF OF APPELLANTS.

I. That the power, contained in the deed of trust, is sufficient to authorize the trustee to sell the premises in question if the notes or either of them were not paid when due, is not denied. Nor is it denied that it was lawful for the University to purchase at the trustee's sale. Sales by a mortgagee or trustee, under a power of sale contained in the mortgage or deed of trust, are valid under the laws of the State of Missouri.

When a sale is made by a trustee, under a power of sale in the deed of trust, the holder of the notes or debt secured by such deed, may become the purchaser at such trustee's sale.

Carson *vs.* Blakey, 6 Mo. Rep., 273.

Destrehan *vs.* Scudder, 11 *Id.* Rep., 484.

Hurt *vs.* Celly, 42, *Id.* Rep., 238.

2d Vol. Wagner's Stat., chap. 99, sec. 13.

II. The theory on which complainant's bill rests is, that Washington University, by reason of its purchase of the property at the trustee's sale, became trustee of complainants, and that the property, notwithstanding the sale, was in the hands of the University merely as security for complainant's indebtedness, and that, after satisfying the same, the surplus (if any) must be accounted for to them. There is no other theory on which this bill can depend.

Manifestly, the complainants, by their bill, do not seek to set aside the trustee's sale, but on the contrary, they seek to establish a *resulting trust*, by showing that the purchaser (Washington University), by a subsequent sale of the property, realized a sum of money more than sufficient to pay the debt secured by the deed of trust, and complainant's claim that the surplus is held by defendants in trust, for their use. This, undoubtedly, was the view of the case taken by the court below.

III. The appellant (the Washington University), denies that it is a trustee, and denies that it can be held to account for the surplus to the complainants.

As already shown, the holder of the notes secured by the

deed of trust had lawful right under the laws of Missouri to purchase at the trustee's sale.

But, independent of the local law of Missouri, there is no principle or rule in Equity that forbade the University from purchasing the property at the trustee's sale.

On general principles, therefore, as well as under the local law, the sale in question must be held valid, unless the fact of impending war suspended, for the time being, the power to the trustee to make the sale.

The court below, in rendering its decree in this case, proceeded on the theory that the sale during the war, by the trustee, under the *Power* in the deed of trust, was *absolutely* void, the debtors being at the time residents of Virginia.

This is the only theory on which the decree can rest.

But the anomaly in this proceeding, consists in compelling the purchaser of the property to account to complainant for any profit made by a subsequent sale of the same property, notwithstanding the trustee's sale was void.

The decree does not, in terms nor by implication, affirm the trustee's sale.

The complainants, probably, state their case broad enough to justify a decree declaring the trustee's sale void, but they do not ask for such a decree unless it be under their general prayer for relief.

It is a fundamental principle in equity proceedings, that a decree can only rest on the case stated in the complainant's bill. Here the bill states a case for a decree, vacating the sale by the trustee, while the decree requires the defendant to account. The decree, therefore, is inconsistent with the bill, and can not be sustained.

IV. The court below, in passing this decree, in effect decided that the power in the deed, authorizing the trustee to sell the land, was suspended during the war, the complainants being at the time within the Confederate States. This is error. On no theory of the law can this ruling be upheld. To determine this question, it is necessary to consider the *Power* contained in the deed of trust—its scope and object.

By this deed the title to the property described was vested in the trustee, with power, in case of the non-payment of the debt, to sell the land, and out of the proceeds of the sale, to

pay the debt and account for the surplus (if any) to the debtors.

This power is irrevocable. Even the death of the grantors would not work a revocation of this power. It could only be extinguished by payment or satisfaction of the debt. The power to the trustee to sell the land is ample in itself, and if the debt is not paid there is an implied duty resting on the trustee to sell, whenever requested so to do by the holder of the debt.

No act of the debtor, nor his death, can stay the hands of the trustee, save only the payment of the debt. The only condition or limitation upon the trustee in the execution of this power, is, that he shall first give thirty days' notice of the time and place of sale, describing the property to be sold, etc. But the required notice is not directed to the debtor, nor to the creditor; but it is general, and is designed to solicit bidders or purchasers for the property to be sold.

It is unnecessary to notify the debtor that his obligation remains unpaid. He must be presumed to know that fact. As stated, the notice to be given by the trustee is general. It is not to the debtor, nor to the creditor—nor to any one in particular. Hence, it is plain, that the object of the notice is to invite competition—create a market, and solicit buyers.

By this deed, the grantors conveyed the land to Ranlett, the trustee, for a specific purpose, viz.: to secure and obtain payment of their indebtedness, and the power of sale was given to enable the trustee to accomplish such purpose, and that, too, without the co-operation or direction of the grantors, in any way. The trustee, so far as relates to the sale, is not subject to the power or control of the grantors. It is manifest that the court below considered that the notice of sale provided for in the deed, was intended for the benefit of the debtors. This is not like a case where notice in fact or constructively is a necessary step in order to acquire jurisdiction. It is, therefore, clearly distinguishable from all of the adjudged cases, touching the effect of the war upon parties, or the rights of parties.

It is not deemed necessary to refer to or discuss the questions decided in Dean *vs.* Nelson, 10 Wallace, 158, or other like cases, because, as already stated, they are not on a footing with this case, but are controlled by different principles.

I have said that the power of sale, in this case, is irrevocable. But, suppose the same parties before the war had executed a power of attorney to Ranlett to make a sale and conveyance of land—or to make a mortgage or deed of trust, to secure a debt, which power the trustee had undertaken to execute in Missouri during the war, the grantors being, at the time, residents of Virginia. Such power, of course, is revocable at will. But will it be asserted as a legal conclusion, that the impending war, itself, worked a revocation of such a power. Surely, such a proposition can not be maintained.

Whatever the parties could do in person, they could do by attorney, notwithstanding they resided within the Confederate States. Nor did the war operate to prohibit a party residing within the Confederate States from making a power of attorney to a party residing in Missouri to do any lawful act within the latter State. The reason is obvious.

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JOHN M. KRUM,
Solicitor for Appellants.

THE WASHINGTON UNIVERSITY, APPELLANT.
vs.
GEORGE B. FINCH & EDWARD B. CHAMBERS, APPELLEES.

In the Supreme Court of the United States,
October Term 1873.

Appeal from the Circuit Court of the United States for the district of Missouri.

Statement as made by Appellees:

I deem it only necessary in view of all the decisions of this Court to state: That the deed of trust in the transcript mentioned, was given to secure the payment of several promissory notes executed to Elliot, President of appellant, for the payment of land, which Daily and Chambers had purchased. They were to give him sixteen thousand dollars, he made them a deed. They paid four thousand dollars in money, and executed these notes for the deferred payments and also separate interest notes; in March 1861 they paid one note of four thousand dollars and also two interest notes. None of the other notes, either for principal or interest became due, until hostilities commenced, nor until after the proclamation of the President of August 16th, 1861. That during the whole period of the war Chambers and Daily resided in Mecklenburg County, Virginia, and that this County of Mecklenburg was in that portion of Virginia declared insurrectionary, and that intercourse was prohibited between the people of that portion of Virginia and the people of Missouri; that Elliot and Ranlet lived here in Missouri; and the Washington University as far as it has any existence, lived in Missouri. That this appellant became the holder of the notes, which had not been paid, and that Ranlet, the trustee, undertook to sell the real estate held by him in trust. And the appellant became the purchaser for a mere song, and resold for the sum of sixteen thousand two hundred dollars. And to avoid complications, the appellees, in their bill pursued the money in the hands of the appellant, instead of the land in the hands of the appellant's vendees. All this will appear from the transcript filed in this Court. The case was before the Hon. J. F. Dillon, U. S. Circuit Judge for this district, and decree rendered of him for appellees.

POINTS AND AUTHORITIES.

During the whole period of the war, Chambers and Daily, the bankrupts were citizens of Mecklenburg County, Virginia, and in fact never lived anywhere else. This County belonged to that portion of Virginia, declared to be in a state of insurrection by the proclamation of the President of August 16th, 1861. This is true in point of fact, and the Court will take judicial notice, that it is in that portion of Virginia, and all intercourse after date of that proclamation was prohibited between the people of that portion of Virginia and the people of Missouri. This proclamation will be found in appendix No. 9. 12 Sal. at large, page 1262. None of the notes which had not been paid, did become due at any time prior to this proclamation. And of course none of these notes had become *lawfully* due and payable, when this pretended sale was made by trustees to the appellant. These notes as well as the deed of trust given to secure them were suspended. Contracts unexecuted, but made before the war are suspended, while those made *flagrante bello* are void. I will only cite just here Hanger vs. Abbot 6 Wall 532. Intercourse was necessary to enable the debtors to pay their creditors, but this was interdicted during the war and the appellant could not receive payment any more than appellees could pay. *All* intercourse was prohibited and the contracts, of which these notes and deed of trust where the evidence were suspended. Hanger vs. Abbott above cited.

(OVER.)

That the late rebellion was a war within meaning of the law of nations, and was followed by the same consequences as any other war, has been repeatedly held by this Court, Prize's cases 2 Black 666. The Venice 2 Wall 258. Mr. Alexander's Cotton case do. 404. Hanger vs. Abbott 6 Wall 532. U. S. vs. Gossumer 9 Wall 72.

It is contended, that the deed of trust in this case containing a power of sale and providing the manner of giving notice, is not within the rule laid in the cases heretofore decided by this Court. But there is no ground for the distinction sought to be made. In the first place, the sale could only be made when the notes became lawfully due and payable, and default was made in the payment of the same. But the notes had not become due and lawfully payable, for the law intervened and prohibited the debtor from paying and the creditor from receiving, and how can it be, that the notes are payable lawfully? If the money was forwarded by the debtor and it reached him, he could not apply it to payment of the notes, but should turn it over to the district attorney, whose duty it was made, especially to enforce the proclamation of the President. See proclamation above referred to. The debtors were no way in default. No laches can be imputed to them, the law interfered and prevented the payment, and the statute of limitations would not run under such circumstances, Hanger vs. Abbott. Are they at fault, for not doing what the Law would not permit them to do? Is it necessary to do more than to state the proposition? In the case of Kanawha Coal Co. vs. Kanawha & Ohio Coal Co. In 7 Blatchford 391. Judge Blatchford says: "The object of the notice must be held to have been to apprise the debtors that the creditor was about to sell the land, and that they must pay the debt and stop the sale etc. The presumption must be either that the debtors saw the notice that the trustees published, or that they did not see it. If the presumption be that they saw it, they could only have seen it by means of an unlawful intercourse, which the Court cannot sanction. If the presumption be that, that they did not see it because by reason of hostilities, it could not reach them, it would be a fraud on them, to uphold a sale on a notice so given." See page 412, case last cited. See also Green vs. Alexander 3 Chicago legal news, decission by Supreme Court D. C. This deed of trust provided for notice, and the manner in which it might be given. At the time the contract was made, publication in a paper in Missouri would be legal and would give notice, but the war commenced (an event not anticipated) and the Law interfered and prevented notice being given in that or any other way; and as notice was especially contracted for, there could be no legal sale without notice, for notice was a condition precedent to the right of the trustee to sell. But here no default was made by the debtor because he law prohibited them from paying as well as the creditor from receiving, and no notice, that is, legal notice was given, and the sale by this trustee was void. But I should be contented to submit the case upon the authority of Dean vs. Nelson alone, 10 Wall 158. None of the allegations of the bill are disputed in the agreed statement appearing in the transcript, and the Court will not be troubled with any questions of fact, and no objection to the relief sought was made, and I ask an affirmance with confidence.

W. H. LETCHER,

FOR APPELLEES.

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BRIEF OF APPELLEES

W. H. LETCHER. for Appellees.